CF0000062686

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (MP)

CRIMINAL APPEAL NO. 2886 /99

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

APPELLANTS (in jail) : 1. Modiyam Kanna Rao son of Dorla, aged 33years.

2. Tatiram Babu, son of Malla Dorla, aged about 21 years.

3. Mani Dharmayya son of Narsa Dorla aged about 31years.

4. Tati Malla son of Munni-Dorla aged about 28 years.

5. Tati Munni son of Pappayya aged about 46 years.

6. Tati Ramlu son of Narsa aged about 29 years.

7. Tati Krista son of Narayya, aged about 33 yrs.

8. Chinta Mutta son of Bujja aged about 25 years.

9. Modiyam Kanna son of Dula aged about 36 years.

10. Chitam Krista son of Mutta aged 36 years.

11. Dhurta Hoonga son of Bablu aged about 29 years.

12. Sodhi Kankayya son of Mutta aged about 31 years.

13. Kadti Bhima son of Lakshmayya aged about 21 years.

All cultivators and residents of village Lankapalli, Police-Station Usur, Dist.Dantewara. M?P?

-Versus-

RESPONDENT : State of Madhya Pradesh

....2

25/10 CLERK C/- Advocate General M. P. JABALPUR

135-37

Filed on 25/10/99 by Shri P. Trivedi Advocate

Rh A.R.

CONVICTION	SENTENCE
To each of the Appellants	
U/s 147 I.P.C.	One year R.I. and fine of Rs.100/-, in default R.I. for One month.
U/s 328 I.P.C.	5 years R.I. fine Rs.500/- in default 3 months R.I.
U/s 201 & 506B IPC.	One year R.I. and fine Rs.500/- in default one month R.I.
U/s 302 R/W 149 I.P.C.	Life imprisonment.

(84)

HIGH COURT OF CHHATTISGARH, BILASPUR

D.B: **HON'BLE SHRI L.C. BHADOO, Ag.C.J.**
HON'BLE SHRI SUNIL KUMAR SINHA, J

Criminal Appeal No.2886 of 1999

Modiyam Kanna Rao and 12 others

Vs.

State of M.P. (Now Chhattisgarh)

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge
22.01.2007

Hon'ble the Acting Chief Justice.

Sd/-
Acting Chief Justice

Post for Judgment: 23.01.2007

Sd/-
SUNIL KUMAR SINHA
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2886/1999

Modiyam Kanna Rao and 12 others

-vs-

State of M.P. (Now Chhattisgarh)

Appearance:

Shri Rajesh Kumar Jain, counsel for the appellants.
Shri U.N.S. Deo, Addl. Public Prosecutor, for the State.

JUDGMENT
(23.01.2007)

Sunil Kumar Sinha, J,

(1) This appeal is directed against the judgment of conviction and order of sentence passed by the first Addl. Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.14/1999 whereby the learned Addl. Sessions Judge held each of the appellants guilty of the offence punishable under the following Sections of IPC and ordered them to undergo sentences as follows with a further direction to run the sentences concurrently:

Conviction	**Sentence**
u/s 147 IPC	R.I. for one year and fine of Rs.100/-, in default of payment of fine, to further undergo R.I. for one month.
u/s 328	R.I. for 5 years and fine of Rs.500/-, in default of payment of fine to further undergo R.I. 3 months
u/s 201 & 506 (part ii) IPC	R.I. for one year and fine of Rs.500/- in default of payment of fine to further undergo R.I. for one month.
u/s 302 r/w section 149 IPC	Life imprisonment

The appellants were charged with the offence punishable u/ss 147, 148, 328, 302 read with section 149 and 120-B, 201 and 506 (Part II) IPC. While convicting them as aforementioned, the learned Addl. Sessions Judge, acquitted them of the charges u/s 120-B and 148 of the IPC.

(2) The brief facts are that the deceased namely Modiyam Lachhamayya was the Patel of village Lankanpalli. The accused Modiyam Kanna Rao was the Sarpanch of the village. He was having inimical relations with the deceased. The reason was that the deceased being the Patel of the village used to object the illegalities committed by the Sarpanch as the Sarpanch did not spent the entire Government funds in the developmental works of the village and he used to misappropriate the major portion of it. The son of the deceased namely Modiyam Ramulu gave a *Dehati Nalishi* on 17.10.1998 that on account of all this, the Sarpanch used to instigate the villagers by saying them that his father was practicing witchcraft against them and by using the sentiments of the villagers on the said pretext, on 05.10.1998, the Sarpanch called a meeting in the village. He was also present in the meeting. The Sarpanch Modiyam Kanna Rao, continued with the meeting from 11 – 12 O' clock till 5 O' clock in the evening, in which, about all the villagers were present. He entered into criminal conspiracy with the villagers for causing death of his father and the Sarpanch Kanna Rao and his associates, namely Tati Rambabu, Madi Dharmaiah, Tati Krishna @ Tati Kidarayya, Chinta Mutta, Dhurta Hunga, Sodi Kanakayya, Tati Ramulu, Modiyam Kanna, Tati Munni, Tati Mall, Chintam Krista, Kadati Bhima etc., assaulted his father

with hands, shoes and Chappal and they constrained him to consume stool (excreta) after adding some poisonous substance therein and after consuming it, they sent him to his house. His father returned to the house and died after two hours of the incident. On 06.10.1998, all the above persons came to his house, forcibly took the body of his father and consigned the deceased to flames. The accused Kanna Rao (Sarpanch) and his associates also threatened the complainant with dire consequences saying that if he reports this matter to the Police he would also be killed like his father, due to which, he could not lodge the report but when the Police came on investigation of the crime of murder of Sodi Narayan on the report of his son Talam Sammi, he could also dare to lodge the report, on which, the said *Dehati Nalishi* Ex.P-8 was recorded.

(3) On the above report, the investigating officer recorded *Dehati Merg* under Ex.P-9 on the same day and thereafter, he prepared a *Panchnama* under Ex.P-2 on 18.10.1998 in which the cause of death of deceased was recorded by the Village *Panchas*. On the same day, he seized burnt bone pieces (100 grams), ashes and the soil from the place where the body was burnt under Ex.P-3, he prepared site plan under Ex.P-12 and thereafter, on the basis of seized bone pieces and ashes of the deceased, registered the first information report under Ex.P10 against 13 accused persons. The seized articles were sent for chemical examination. After completion of the enquiry, a charge sheet under sections 147, 328, 302 read with section 149, 120B and 201 of IPC was filed on 19.10.1998 in the Court of C.J.M., Dantewada, who in turn, committed the case to the Court of

Sessions on 04.1.1999 from where the Addl. Sessions Judge, Bastar at Jagdalpur received the case on transfer and conducted the trial.

(4) In order to establish the guilt of the accused persons, the prosecution examined as many as 8 witnesses, out of which, except the son and wife of the deceased namely Modiyam Ramulu (P.W.6) and Modiyam Mutti (P.W.7) and the Investigating Officer R.S. Patel (P.W.8), all other witnesses turned hostile. The conviction is based upon the testimonies of these three witnesses only.

(5) Learned counsel for the appellants argued that the prosecution has failed to establish the homicidal death of the deceased.. He also argued that the involvement of these appellants have also not been established by the prosecution and these appellants, especially appellant nos. 2 to 13 may be given benefit of doubt.

(6) On the other hand, learned State Counsel opposed the above arguments and supported the conviction and sentence awarded by the Sessions Court.

(7) We have heard learned counsel for the parties at length and have also perused the records of the Sessions Trial.

(8) So far as the factum of homicidal death of deceased is concerned, it has been stated by the son of the deceased namely Modiyam Ramulu (P.W.6) that his father died on 5th of October, 1998 on account of consuming stool (excreta) mixed with poison at the instance of Sarpanch Kanna Rao and his associates. His father was Patel of the village and he was having inimical

relations with Kanna Rao on account of which, Kanna Rao has called a meeting in the village and in the said meeting, the accused persons started beating his father by *Danda* and legs and thereafter they constrained him to consume stool (excreta) after adding some poisonous medicine in it. His father was resisting to consume the same, for which he was again beating by the accused persons. After that his father came to the house where he died. He has further stated that on the next morning, the accused persons again came to his house and the dead body of his father was taken to the place where it was burnt. He also mentioned about the threatening given by the accused persons. Almost similar evidence on this point has been given by the wife of the deceased namely Modiyam Mutti (P.W.7). Supporting the evidence of her son, she states that the accused persons present in the Court murdered her husband. Her husband was village Patel and accused Modiyam Kanna Rao was the Sarpanch. He being the Sarpanch called the meeting. She does not know why the meeting was called. Her husband has gone to the meeting, he was accompanied by her son Modiyam Ramulu, her husband was assaulted by legs, fists and *Danda*. Thereafter some poisonous substance was mixed in the stool (excreta) and her husband was forced to consume it which he consumed. She has categorically stated that she had seen the accused persons assaulting her husband. She states that thereafter her husband died in the house. She further states that in the next morning the accused persons came to her house and took the body of her husband towards the funeral site where his *Kriya Karma* were done by them. She was threatened by them for not disclosing

the facts to the others and also for not reporting the matter saying that if the matter will be reported, they all will be put on fire confining them in their house.

(9) Apart from this, the contents of *Panchnama* Ex. P-2 would show that the deceased was beaten by the accused persons who are named in the *Panchnama* and was constrained to consume the stool mixed with poisonous substance, on account of which, he died. The investigating officer after taking *Panchnama*, has also seized the pieces of bones and the ashes from the place where the dead body was burnt, as indicated by the son of the deceased, under Ex.P-3, which was sent for chemical examination, on which a report Ex.P-30 was received, according to which, the bones were of human origin, they were bones belonging to some individual. The sex was male, age towards old. The expert also opined that the cause of death remains opened as no injury was evident on the available bones and the duration of the death cannot be said as the bones were burnt. All above evidence shows that in the first instance the deceased Modiyam Lachhmayya was assaulted with hands, fists and *Danda* and then he was constrained to consume stool (excreta) mixed with some poisonous substance and after receiving such assault by so many persons, he went to his house where he died and in the next morning his body was forcibly taken from the house which was burnt. In these circumstances, it is established that Modiyam Lachhmayya met with a homicidal death.

(10) Now the second question arises about the involvement of the appellants in commission of the aforesaid offence. It has

been stated by the son of deceased Modiyam Ramulu (P.W.6) that the Sarpanch Modiyam Kanna Rao on account of inimical relations with his father convened a meeting on 5th of October 1998 and called his father who was Patel of the village. The reason of animosity was that his father used to object the illegalities committed by the Sarpanch as he did not make the correct payments to the villagers and his father was always pressing for making correct payments to them, on this Kanna Rao made conspiracy to kill his father. After this, the meeting was called and the villagers were provided Alcohol and Kanna Rao also promised to give Rs.1000/- each. His father was called in the meeting. He has also gone to the meeting. He was beaten there and was threatened not to report the matter to the Police Station, otherwise he will be killed. After this, his father was also beaten by the accused persons by *Danda* and Legs and thereafter he was constrained to consume stool mixed with poison. When he resisted to take the same he was severely beaten but finally he was constrained to drink it after beatings and then his father came to the house where he died. In the court statement, this witness has only named the Sarpanch (Modiyam Kanna Rao) but he has not named other accused persons and has only uttered "Kanna Rao and his associates", but who were his associates is nowhere disclosed in the evidence of this witness. Though it comes in the second paragraph of his examination-in-chief that the accused persons had assaulted his father with the help of *Danda* and legs, but even here also he has not named the accused persons nor identified them from the dock but in vague and general manner he gave an omnibus

statement that the accused persons have done like that. Same is the position of other witness i.e., the wife of deceased namely Modiyam Mutti (P.W.7). She has also named Modiyam Kanna Rao in her evidence but she has not named other accused persons, though she has made statement in the manner saying that *"Hazir Adalat Abhiyukt Gan"* which means the accused persons present in the court.

(11) The argument of learned counsel for the appellants was that the evidence recorded in the said manner is not sufficient to involve the accused persons, who are neither named in the statement nor identified by the witnesses, and this vague and general description given by the witnesses in their examination in chief would not be sufficient to hold the accused persons guilty of the offence. This argument advanced by learned counsel for the appellants was vehemently opposed by counsel for the State. Learned State Counsel submitted that the accused persons are named in the *Dehati Nalishi* (Ex P-8) as also in *Merg* intimation (Ex.P-9) and the F.I.R. (Ex.P-10) lodged by P.W.6 Modiyam Ramulu, son of the deceased and therefore, when these witnesses are deposing in the manner referring to the words *"Abhiyukt Gan Hazir Adalat"* , then it should be held that they were referring to the accused persons who were present in the Court and their such evidence is corroborated by the, *Dehati Nalishi, merg* intimation and F.I.R.

(12) It is a settled principle of law that the first information report is a report giving information of the commission of a cognizable crime which may be made by the complainant or by any other person knowing about the commission of such an

offence. It is intended to set the criminal law in motion. Any information relating to the commission of a cognizable offence is required to be reduced to writing by the officer in charge of the Police Station which has to be signed by the person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. The registration of the F.I.R., empowers the officer in charge of the police station to commence investigation with respect to the crime reported to him. A copy of the FIR is required to be sent forthwith to the Magistrate empowered to take cognizance of such office. After recording the F.I.R. , the officer in charge of the police station is obliged to proceed in person or depute one of his subordinate officers not below such rank as the State Government may, by general or special order, prescribe in that behalf to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. The Apex Court has further held that it is a settled principle of law that the F.I.R. is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 161 of the Evidence Act, 1872 or to contradict him u/s 145 of the said Act. It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses. (***Please see (2005) 9 SCC 315 – Ravi Kumar –vs- State Punjab***).

(13) In order to establish the involvement of the accused persons, in committing murder of Modiyam Lachhmayya and

that they were members of the unlawful assembly, the prosecution thorough these witnesses ought to have adduced the evidence by naming each of the accused that they were members of the unlawful assembly and each of them acted in furtherance of common object of the unlawful assembly or if it was not possible for the witness to take their names in the Court evidence, then atleast the witnesses ought to have identified these accused by indicating towards each of the accused in their Court evidence that he was member of the unlawful assembly at the time of commission of crime or their evidence should have been recorded in such a manner which may identify each of the accused, making allegations regarding their involvement in the crime. Unless each of the accused is identified before the Court or is named by the witnesses before the Court saying that he took part in commission of the crime either being the member of unlawful assembly or by adding particular overt act, merely by saying that the accused persons were the members of the unlawful assembly and they had participated in beating of the deceased without their proper identification before the Court either by name or by any other means, which have been stated herein above, they cannot be held guilty of offence on such a week evidence produced against them.

(14) There appears to be force in the arguments advanced by learned counsel for the appellants and the arguments advanced by learned counsel for the State that since the accused persons were named in the F.I.R., therefore, the evidence of these witnesses stands corroborated, cannot be accepted. Rather it would be an omission on the part of these witnesses that they

did not mention the names of persons whom they had mentioned in their earlier statement like *Dehati Nalishi, Merg* intimation, F.I.R., and in their 161 statements and to that extent their evidence cannot be held to be reliable.

(15) In the opinion of this court, the evidence of these two witnesses namely Modiyam Ramulu P.W.6 and Modiyam Mutti P.W.7, son and wife of the deceased, so far as it relates to appellant no.2 to 13 cannot be accepted and the involvement of appellants no.2 to 13 in both the incidents i.e., in the incident of the village meeting on 05.10.1998 and also in the incident of taking and burning the body of the deceased on the subsequent day are doubtful and they are entitled to be given benefit of doubt and we hold it accordingly.

(16) So far as the accused/appellant Kanna Rao (Sarpanch) is concerned, he is named by these witnesses in their statements and evidence against him is cogent and reliable and his involvement in the incident is proved beyond reasonable doubt and to this extent, the testimony of these two witnesses are corroborated by each other and also by the F.I.R. etc. Their evidence is held to be reliable to the said extent.

(17) So far as commission of offence u/s 328 is concerned, there is no evidence that the accused persons brought poison and the deceased was forced to consume the same. In the absence of cogent evidence that in fact the accused persons were in possession of some poisonous substance and the same was mixed in the stool and the deceased was constrained to consume it, they cannot be held guilty of this offence. As we have already

held that the involvement of the Appellants no.2 to 13 is doubtful and there is no positive evidence that even the accused appellant Modiyam Kanna Rao constrained the deceased to consume poisonous substance, we hold that the prosecution has utterly failed to establish this offence against the accused persons. Likewise, offence u/s 147 is also not established by cogent and reliable evidence.

(18) So far as offences u/ss 506(part ii) and 201 are concerned, there is evidence of P.W.6 and P.W.7 that they were threatened, but there also, except Appellant no.1, no particular person is named by them and if we read their statements in the context of only one named person i.e., Sarpanch Modiyam Kanna Rao, then these offences are also not established against other persons. Who were the persons threatened them ? Who were the persons causing disappearance of the evidence by putting the dead body to fire is not established beyond reasonable doubt. Therefore, all the accused persons except appellant no.1 Modium Kanna Rao deserve to be acquitted under these charges also.

(19) In the result, this appeal is partly allowed. The conviction and sentences of appellant nos. 2 to 13 are set aside. They are acquitted of the charges framed against them giving benefit of doubt to them. The conviction and sentence of appellant no.1 Modiyam Kanna Rao u/s 302 read with section 149 is maintained. His conviction and sentence u/s 201 and 506 (part ii) are also maintained. However, this appellant is also acquitted of the charges framed u/s 147 and 328 IPC.

(20) This Court takes judicial notice that another person namely Sodi Narayan was also victim of almost similar kind of crime, for which, a separate Sessions Trial vide No.15/1999 was conducted by the same A.S.J., and all the accused persons (the present appellants) were convicted, against the said conviction an appeal was filed which was heard and disposed of by the Division Bench of this Court vide Criminal Appeal No.2942/1999 in which 10 accused persons were acquitted. In the said appeal (Cr.A.No.2942/99) one of us (L.C.Bhadoo, J) had presided over the Bench and in that case also, almost similar situation was faced by the Bench and before parting with the judgment, the said Bench made observations that "it is sad that in such heinous crime on account of the lapse of investigation, the prosecution agency, as well as the indifferent attitude of the Presiding Officer, the above ten accused persons have been acquitted. The perusal of the record shows that the investigation has been conducted in a very casual and cavalier manner without realizing the sensitivity of the matter. Equally, the Prosecutor before the Court has not conducted the case with sincerity. He did not care, while examining the prosecution witnesses, to ensure that the evidence of prosecution witness must be adduced in a proper manner about the involvement of each accused. The Presiding Officer, who was a Judicial Officer of the rank of Sessions Judge, was equally casual and callous while recording the evidence. The manner in which he recorded the evidence shows that he remained as a silent spectator. Time and again, the Apex Court has lamented upon such Judicial Officer and has observed that while conducting the proceeding

the Judicial Officer must participate actively in the proceeding and he is not expected to remain as silent spectator. Wherever he feels necessary, he himself can ask questions to the witness in order to bring on record the correct position. In a recent judgment in ***Zahira Habibullah Sheikh and another –vs- State of Gujarat and others*, reported in 2006 AIR SCW 1340**, the Apex Court observed that *fair trial would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial."*

(21) We are constrained to repeat the same observations here also and direct that copy of the judgment shall also be sent to the Home Secretary, Law Secretary, Registrar General of the High Court, Director General of Police and Director (Prosecution) for needful and necessary action.

Sd/-
Acting Chief Justice

Sd/-
SUNIL KUMAR SINHA
Judge

Rao